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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1567

Intermediate Accounting of the Public Administrator of the County of New York, as Administrator of the Estate of

JOHN PATRICK FAY, also known as JOHN P. FAY,
Deceased,

VIOLET JOSEPHINE FAY BUCK,
Appellant,

FLORENCE SYLVIA WETHERALL HUNTER, KATE WETHERALL SPENCER, and LAURETTE CAILLOL,
Appellees,

STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

APPELLANT'S REPLY BRIEF

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Responsive Arguments to Appellees' Motions

Appellees, in moving to dismiss or affirm, seek to relitigate the concluded fact of decedent's paternity as a facet of their opposition to unconstitutionality. In contrast, the process of invoking this Court's constitutional jurisdiction brings to the Court decisional finality of decedent's acknowledged paternity as well as the consistent

challenge in the State courts of federal unconstitutionality in EPTL 4-1.2(b). In this unvaried posture of a litigant whose case and controversy rests wholly on substantive federal constitutional grounds, appellant appeals to this Court for constitutional equal protection by invalidation of a state law whose invidious discrimination is directed against her solely because she happens to be a half-sister, having the same father, of the acknowledged illegitimate.

Decedent's birth record is a formal acknowledgment and recognition of paternity on the part of his father and mother, who in their own handwriting designated themselves as his mother and father, and signed the record, witnessed by the civil registrar, in a public register in a public repository, confirmatory of an earlier baptismal record of birth (*Matter of Fay*, 44 N.Y.2d 137, 142). Under Scots law, nothing more was required to acknowledge paternity (Jurisdictional Statement, pp. 4-5, 8). There is no other public document subscribed by decedent's mother acknowledging her maternity and the paternity of the decedent. Grandmother Wetherall-Hunter's attestation as to her son's paternity binds niece-appellees, her descendants.

In *Rudolph* v. *Rudolph*, Ky. App., 556 S.W.2d 152, an illegitimate child whose parentage was not in dispute even though there was no order of filiation claimed the right to inherit from his intestate father, and contended that Kentucky Revised Statute 391.090(2), reading: "A bastard shall inherit only from his mother and his mother's kindred," was unconstitutional.

In the course of its opinion, the Kentucky Court of Appeals made these pertinent observations (556 S.W.2d at pp. 154-155):

> Statutes of other states, similar to our statute here, have been upheld on the basis that they further a state interest in promoting legitimate

family life and strengthening family ties. The state does have a proper interest in promoting such ends, but we fail to see how KRS 391.090(2) can be justified on this basis. In the first place penalizing an infant appears to be a rather dubious and unreasonable method of discouraging his parents from certain conduct before he is even born. Secondly, the Legislature does not appear to have been motivated to preserve or strengthen legitimate family life in enacting this statute since it permits an illegitimate child to inherit from his mother and her kindred. It is unlikely that our lawmakers would intend to encourage the family ties of a father but not those of a mother.

The more likely purpose of this statute, and one found to be the purpose of similar statutes in other states, is to provide for the stability of land titles and the prompt and definitive determination of the ownership of property left by a decedent. *Labine, supra.* In a case in which there is no question of the parentage of a claimant, a statute which intends to provide for the prompt and definitive determination of the ownership of property left by a decedent should have no application. The effect of applying a statute such as ours to that situation denies a claimant inheritance not because his parentage is questionable but simply because he was born out of wedlock. This is the situation here. The appellant in effect has been denied the right to inherit from his father solely because he was born out of wedlock. Such a result is essentially unjust and cannot be grounded in any legitimate interest of the people of Kentucky.

Under our statute a claim of illegitimate filiation, no matter how false, may be made against the estate of a *female*, while a similar claim, no matter how meritorious, is prohibited from being made against the estate of a *male*. This is indeed

> a curious, and we believe unreasonable, method of providing for prompt and definitive determination of title to property. We are well aware that normally it is less difficult to prove a maternal than a paternal relationship, but we are equally aware that in our modern society such is often not the case. In any event, the problem of proof seems more reasonably to address itself to evidentiary standards than to the outright barring of claims. The Legislature is certainly free to enact reasonable legislation to guard against false claims and to require that any claim be made within a period of time which will provide for prompt determination of title to property. (Emphasis supplied.)

The Kentucky Court of Appeals in that case granted appellant the right to inherit from his intestate father and noted that *Trimble* v. *Gordon*, 430 U.S. 762, appeared to support on federal constitutional grounds the result it reached (556 S.W.2d 154, n.1). This was the very statute at issue in *Pendleton* v. *Pendleton*, 431 U.S. 911, wherein this Court vacated the judgment of Kentucky's highest court, its Supreme Court, and remanded in light of *Trimble*. The Kentucky Supreme Court in that case has now struck this statute as unconstitutional (— S.W.2d —, decided October 7, 1977).

Lalli II (43 N.Y.2d 65), in seeking to ease the bite of the *Trimble* holding, professed this Court did not forbid a state from requiring as proof of paternity a judicial determination during the lifetime of the father. This is self-evident from this Court's vacatur, not reversal, of the *Lalli I* judgment (431 U.S. 911; 38 N.Y.2d 77). But, in our view, this Court accepted an order of filiation as *a* method of proving paternity, but not *the* exclusive means of so doing (*Trimble*, 430 U.S. 762, 772, n.14); further this Court heightened the degree of its scrutiny where the factor of illegitimacy was present and lowered the standards of proof to establish paternity. If

proofs are sufficient to establish the paternity of the child, why then are these proofs insufficient to establish the fact of fatherhood?

When appellees say there is a distinction between an illegitimate, and appellant, arguing there is no question of discrimination against an illegitimate involved here, they disregard the whole impact motive of the single discriminatory word—ILLEGITIMATE—as the same has been applied to appellant. Were it not for the application to her by the statute and the State court of this inimical, unredemptive word, which they specifically direct against her because she is in consanguinity with her father, appellant would not be before this Court on this appeal. They stand on the single proposition of across-the-board disenfranchisement in illegitimacy of all paternal kindred with no distinction between appellant and her deceased half-brother.

The Commission's recommendation, in these general words—"*However*, no kindred of the father may represent him to take from the estate of the *recognized* illegitimate" (Appendix G, p. G-4, 1st full par., last sentence; emphasis supplied)—is the sole statement in the Report for statutory exclusion of paternal kindred. On this isolated attenuated afterthought of a sentence, the Legislature, in shapeless innovation, contained all paternal kindred within the bars of a despised category of illegitimate representation. Here then is even-handed statutory distribution of equality in illegitimacy with the decedent to all those in consanguinity with the illegitmate's father.

The State court's basic rationale for justifying their discriminatory exclusion of paternal kindred from intestate inheritance, even were there an order of filiation, lies in the court's heavily weighted reliance on a judgment, merely legislative, drawn from the Commission's Report, which rests on assumptions and dogmas of rele-

vancy stemming from an ancient enclave mentality discriminately indispositioned towards illegitimates and their fathers.

Aliusque et idem. Though appellant be another, according to the State court, she is the illegitimate: a surrogate in illegitimacy for her half-brother.

Neither decedent nor appellant should shoulder the brunt of his illegitimacy where others, marked but unaffected by this stigma, and equally circumstanced, share his estate in intestacy (See, Professor Rohan's Supplementary Practice Commentary, pp. 103-104, 17B, McKinney's Consolidated Laws of New York, Cumulative Annual Pocket Part, for use in 1977-1978).

In contrast to the views of the State court concerning the legislative purpose of the law, many nations have joined together in convention to bring a new *legal* light to the blight of illegitimacy;[1] and various state courts, in increasing numbers, are re-evaluating and remolding, along constitutional lines, their previous positions concerning inheritance from, by and through illegitimates.

Notwithstanding an ongoing national[2] and international *legal* upheaval in intestate succession involving considera-

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[1] European Convention on the Legal Status of Children Born out of Wedlock, Strasbourg, October 15, 1975. Articles 3 and 9 provide: (3) "Paternal affiliation of every child born out of wedlock may be evidenced or established by voluntary recognition or by judicial decision;" (9): "A child born out of wedlock shall have the same right of succession in the estate of its father and its mother and of a member of its father's or mother's family, as if it had been born in wedlock." The Convention is in force; the latest nation to ratify it is Switzerland, on May 10, 1978.

[2] At latest count, eleven states now recognize inheritance from, by and through an illegitimate.

tions of illegitimacy, New York's highest court discerns equal protection in EPTL 4-1.2(b). In our view EPTL 4-1.2 is a wrong-side-of-the-track statute, unmistakably and manifestly directed toward depriving paternal kindred and illegitimates of their inheritances solely on a gender-based divisor of an unwed father.

The questions for determination here are not predicated on the presence or absence of direct discrimination against the illegitimate, but rather on whether EPTL 4-1.2(b) is constitutional because of its positive and direct discrimination against appellant, who is denied the same protection as maternal kindred, because appellant is in consanguinity with her acknowledged illegitimate brother, of the same father.

The principle evoked by this appeal does not rest on a plea for reciprocity but for equal protection in recognition of the parity granted appellant as an equally-circumstanced distributee with appellees in EPTL 4-1.1, the general statute of intestate distribution, released from the unconstitutional statutory attribution of disentitlement in illegitimacy.

At this point, appellant parallels her arguments with a similar case wherein the stigmatizing factor of gender-based discrimination was found unconstitutional. In *Matter of Brooks*, #33,535 of the District Court of Lea County, New Mexico, affirmed in a decree-unreported opinion of the Supreme Court of New Mexico, — New Mex. —, dated October 21, 1975, this Court, sub. nom. *Schanefelt* v. *Paradiso*, vacated and remanded the case to the New Mexico Supreme Court "for further consideration in light of *Califano* v. *Goldfarb*, 430 U.S. .... (1977) and *Trimble* v. *Gordon*, 430 U.S. .... [1977]" (431 U.S. 911).

Lucy Brooks' Will, naming her executor sole legatee, was admitted to probate on his application alleging that decedent left no relatives by consanguinity.

Appellant Schanefelt challenged the validity of the Will, alleging she, her brother and nephew, were all the distributees of decedent's predeceased husband and claimed, therefore, that they were the only blood relatives of said predeceased husband and, accordingly, were the decedent's distributees under 53 N.M.S.A., Sec. 29-1-15, which read at decedent's death on March 27, 1973:

> Inheritance by heirs of wife.
>
> If heirs are not thus found the portion uninherited shall go to the heirs of the wife of the intestate, if dead, according to like rules, and if he has had more than one [1] wife, who died, it shall be equally divided between the heirs of all such wives, taking by right of representation.

Appellee Paradiso contended said section applied solely to inheritance by heirs of a predeceased wife and not to heirs of a predeceased husband. Appellant Schanefelt claimed the section should grant inheritance to distributees of a predeceased husband or, otherwise, was unconstitutional under the Equal Protection Clause of the United States Constitution.

The District Court granted appellee's motion to dismiss appellant's petition, as amended, holding that appellant was not a distributee of decedent.

On appeal to the Supreme Court of New Mexico, appellant repeated her contention that the statute was unconstitutional "if not applied to the heirs of a predeceased husband." The New Mexico Supreme Court affirmed the District Court's order granting appellee's motion to dismiss on the ground appellant was not a distributee of decedent.

Appellant appealed to this Court on the question (in her Jurisdictional Statement) whether

> Equal protection of the laws provided by the Fourteenth Amendment to the Constitution of the United States requires application of 53 N.M.S.A., Sec. 29-1-15 to heirs of deceased husbands as well as to heirs of deceased wives. (Jurisdictional Statement, p. 5)

As noted, this Court *summarily* vacated the judgment of the New Mexico Supreme Court on May 16, 1977, the same day it *summarily* vacated the judgment in *Matter of Lalli*, 38 N.Y.2d 77 (431 U.S. 911).

Significant here is this Court's citation of *Califano* v. *Goldfarb*, 430 U.S. 199, in its vacatur of the *Brooks* judgment. At the very least, the implication is clear that similarly situated kindred may not be treated differently because of the sex of a decedent's parents, where inheritance *from* an intestate is involved.

Assuming that classifications based on illegitimacy trigger a heightened level of scrutiny, and assuming further that the goal is equality of status and treatment, this Court, consistent with the Equal Protection Clause, respectfully is requested to resolve the distinction, contrived in our view, between paternal and maternal kindred insofar as intestate succession is concerned.

The arguments offered by appellees in opposition are tenuous, insubstantial and inappropriately applied to appellant's claim of jurisdiction in the Supreme Court of the United States to entertain this appeal. Moreover, counsel are of the considered opinion that the summary dispositions in *Pendleton* and *Schanefelt*, in light of *Trimble*, warrant this Court's further consideration whether summary disposition by reversal and remand is justified in this case.

CONCLUSION

Appellant respectfully submits the Supreme Court of the United States has jurisdiction of this appeal.

Respectfully submitted,

Dated: May 31, 1978

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